Supreme Court, U.S.
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No. 97-1566

In The

Supreme Court of the United States

October Term, 1997

BEVERLY DETERESA,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC. AND ANTHONY RADZIWILL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent American Broadcasting Companies, Inc. hereby submits this statement identifying its parent companies and nonwholly-owned subsidiaries. American Broadcasting Companies, Inc. has no nonwholly-owned subsidiaries. The parent company of American Broadcasting Companies, Inc., is ABC, Inc. (formerly known as Capital Cities/ABC, Inc.). On February 9, 1996, The Walt Disney Company completed its acquisition of Capital Cities/ABC, Inc. which is now a wholly-owned subsidiary of The Walt Disney Company. Therefore, American Broadcasting Companies, Inc. is an indirect subsidiary of The Walt Disney Company, which is the entity whose shares are currently traded.

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Appendix A — Request For Hearing En Banc By The United States Court Of Appeals For The Ninth Circuit 1a

INTRODUCTION

Respondents American Broadcasting Companies, Inc. ("ABC") and Anthony Radziwill respectfully submit this brief in opposition to petitioner Beverly DeTeresa's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition presents no issue appropriate for review by this Court. Moreover, the petition is jurisdictionally out of time and should be denied for that reason alone.

STATEMENT OF THE CASE

On June 12, 1994, Nicole Brown Simpson and Ronald Goldman were killed in front of Ms. Simpson's Los Angeles home. Shortly after the murders occurred, O.J. Simpson boarded an American Airlines flight from Los Angeles to Chicago.

In the days that followed the murders, public attention focused upon Mr. Simpson's activities on the night of June 12, 1994. As public, police and media interest intensified, reports began to appear that described Simpson's behavior and demeanor on the flight to Chicago in various, sometimes contradictory ways. For example, the NBC Nightly News reported that a flight attendant had told police that Simpson had kept his hand in a duffel bag throughout the flight to Chicago. Other journalists reported that Simpson had kept his hand on ice during the flight.

The flight attendant responsible for the first-class section on the American Airlines flight was Beverly DeTeresa, the petitioner here. A week after the flight, on June 19, 1994, an ABC associate producer named Anthony Radziwill came to the front door of DeTeresa's condominium. The front door was visible from the street.[1]

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1. The facts set forth in this statement are taken from the undisputed facts contained in the District Court record on summary judgment.

When DeTeresa came to the door, Radziwill immediately informed her that he worked for ABC News. DeTeresa assumed that Radziwill was a reporter. DeTeresa walked onto her front porch to talk to Radziwill and closed the front door behind her. Radziwill had asked a cameraman to make a videotape of his encounter with DeTeresa from the cameraman's vantage point in a public street. Radziwill also made an audio tape recording of the conversation.[2]

Prior to her conversation with Radziwill, DeTeresa had seen several news accounts regarding O.J. Simpson's behavior and demeanor on the flight to Chicago that she knew to be erroneous. According to her deposition testimony, she was frustrated by the misinformation being disseminated, and she wanted the news reports regarding Simpson's flight to Chicago to be accurate. Upon learning that Radziwill worked for ABC News, DeTeresa volunteered to Radziwill that Simpson had not had his hand in a duffel bag or in a bag of ice during the flight, as some news accounts had stated. Before providing this information to Radziwill, whom she believed to be a reporter, DeTeresa did not request that Radziwill keep the information in confidence. DeTeresa testified at her deposition that Radziwill did not promise to keep that information, or anything else DeTeresa said, in confidence.

Near the close of their conversation, Radziwill asked DeTeresa to appear on an ABC news program regarding the

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2. Radziwill stated in sworn interrogatory responses that were made a part of the record below that

> [b]ecause of the rumors circulating and being reported regarding O.J. Simpson's appearance and conduct on the flight to Chicago, I wanted to have the flight attendant's actual words available to the reporters and senior producers working on the story.

Simpson case that was scheduled for broadcast the next day. DeTeresa said that she would consider it.

Radziwill called DeTeresa on the morning of June 20, 1994. Radziwill informed DeTeresa during that telephone call that he had taped their conversation the previous afternoon. He also informed her that a videotape had been shot at the same time.

DeTeresa subsequently asked her husband to contact Radziwill. Mr. DeTeresa spoke that morning with both Radziwill and a senior ABC producer. Mr. DeTeresa asked the senior producer not to identify his wife by name in the report ABC was going to broadcast. Mr. DeTeresa also asked the senior producer not to use any portion of the audiotape.

ABC complied with the requests made by Mr. DeTeresa. In its "Day One" program on the evening of June 20, 1994, ABC broadcast a five-second clip from the videotape showing Ms. DeTeresa's picture, while stating that

> the flight attendant who served Simpson in the first class section told "Day One" that she did not, as widely reported, see him wrap his hand in a bag of ice.

ABC did not identify DeTeresa by name, and the broadcast made no reference to DeTeresa's city or state of residence. DeTeresa's voice was not heard at any time, and no portion of the audiotape was ever broadcast.

DeTeresa filed her complaint against ABC and Radziwill in June 1995, almost one full year after the taping had occurred. The complaint asserted claims for: (1) unlawful recording of confidential communications under the California *Penal* Code; (2) "physical intrusion on solitude or into private affairs"; (3)

violation of the federal eavesdropping statute, 18 U.S.C. § 2511; (4) fraud; and (5) unfair business practices.

In November 1995, the District Court granted the defendants' motion for summary judgment as to all of DeTeresa's claims. *See* Petition, pp. 27a-33a. The Ninth Circuit affirmed the District Court's order in an opinion filed in July 1997. *See* Petition, pp. 1a-26a.

REASONS FOR DENYING THE WRIT

I.

THE PETITION WAS NOT TIMELY FILED, AND THE COURT LACKS JURISDICTION TO HEAR IT.

The Ninth Circuit's judgment in this matter was entered on July 29, 1997. *Id.* Under Rule 13, DeTeresa's petition for writ of certiorari had to be filed within 90 days after entry of the judgment, unless a petition for rehearing was timely filed in the Court of Appeals. Rule 13 also provides that a suggestion to a Court of Appeals for a rehearing en banc is *not* considered to be a petition for rehearing within the meaning of Rule 13 unless it is so treated by the Court of Appeals.

DeTeresa did not file a petition for rehearing. Instead, on August 14, 1997, DeTeresa filed a "Request for Hearing En Banc" that sought an *en banc* hearing by the Ninth Circuit on certain issues. DeTeresa did *not* seek a rehearing by the original panel, as demonstrated both by the caption of the document she filed and by its first sentence, which is set out below:

> TO THE HONORABLE JUDGES OF THE NINTH CIRCUIT: Beverly DeTeresa requests a hearing en banc on the issues stated below.

A copy of the cover and the first page of text of DeTeresa's "Request for Hearing En Banc" is attached hereto as Appendix A.

The Ninth Circuit's November 14, 1997 Order denying DeTeresa's "Request for Hearing En Banc" demonstrates that the Court did not treat DeTeresa's "Request" as a petition for rehearing. The Order is set out below in full:

> Judge O'Scannlain and Judge Tashima have voted to reject Appellant's suggestion for rehearing en banc and Judge Whaley so recommends. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The suggestion for rehearing en banc is rejected.

See Petition p. 34a. As this Order makes clear, the Ninth Circuit treated DeTeresa's "Request for Hearing En Banc" as a suggestion for rehearing en banc, which it clearly was.[3]

Under Rule 13, a suggestion for rehearing en banc does not suspend the running of the time to file a petition for writ of certiorari. Because that time limit is jurisdictional under 28 U.S.C. § 2101(c), and because DeTeresa's petition for writ of certiorari was not filed until more than 90 days after the Ninth

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3. DeTeresa's suggestion for rehearing en banc was not timely filed in any event. The last day for filing a petition for rehearing *or* a suggestion for rehearing en banc was August 12, 1997, fourteen days after entry of judgment on July 29, 1997. *See* Fed. R. App. Pro. 35(c); 40(a). Rule 26(c), which adds three days to a prescribed period for filing a document when the triggering event is "service of a paper" upon a party, does not apply where the time for filing begins to run upon entry of judgment. *See generally Haroutunian v. I.N.S.*, 87 F.3d 374, 377 (9th Cir. 1996).

Circuit's July 29, 1997 entry of judgment, the petition should be denied.

II.

EVEN IF IT HAD BEEN TIMELY FILED, THE PETITION SHOULD BE DENIED BECAUSE IT PRESENTS NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT.

A. The Petition Primarily Addresses Issues of State Law.

The bulk of DeTeresa's petition is devoted to an attack upon the Ninth Circuit's resolution of certain questions of California common and statutory law. *See* Petition, pp. 15-29 (addressing common law claims of intrusion and fraud and statutory claim based upon California Penal Code § 632(a)). Because this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals," *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13, 106 S. Ct. 1292, 1301 n.13 (1986) (plurality opinion), the petition's emphasis upon state law should lead the Court to deny it. *See also McMillian v. Monroe County, Ala.*, __ U.S. __, __, 117 S. Ct. 1734, 1737 (1997) ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law"); *Cort v. Ash*, 422 U.S. 66, 73 n.6, 95 S. Ct. 2080, 2085 n.6 (1975) (noting that the Court's deference to the lower Federal courts' determinations of state law questions "should generally render unnecessary review of their decisions in this respect.").

B. The Ninth Circuit's Resolution Of The State Law Issues It Addressed Was Reasonable And Well Supported By Existing Law.

1. *Penal Code § 632.*

DeTeresa's petition to this Court addresses three of the four California law claims asserted in her original complaint. DeTeresa's First Claim for Relief alleged that ABC and Radziwill had violated Section 632(a) of the California Penal Code, which bars the intentional recording of a "confidential communication" without the consent of all parties to that communication. As the statute makes clear, it is an essential element of a section 632(a) claim that the plaintiff show that the conversation that was taped was "confidential." Petition, p. 35a.

In *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 248, 273 Cal. Rptr. 674 (1990), the California Court of Appeal "distill[ed]" from an analysis of prior case law

> the basic rule that the statute means what it says . . . . Did [the plaintiff] reasonably expect[ ], under the circumstances of the [conversation], that the conversation would not be divulged to anyone else.

The *O'Laskey* court also held that the

> [a]pplication of the statutory definition of "confidential communication" turns on the reasonable expectations of the parties judged by an objective standard and not by the subjective assumptions of the parties.

Id.

The District Court and the Court of Appeals correctly found that DeTeresa could not make the showing required under *O'Laskey*. It was not disputed that DeTeresa: (1) knew that she had personal knowledge regarding a murder suspect's demeanor and conduct less than two hours after the murders had occurred; (2) knew that the knowledge she possessed contradicted earlier, widespread press reports; (3) believed that she was talking to a network news reporter; and (4) never sought or received any promises of confidentiality or anonymity as to anything she said.

In light of these undisputed facts, the lower courts correctly held that no reasonable jury could find that, "judged by an objective standard and not by the subjective assumptions of the parties," DeTeresa "reasonably expected . . . that the conversation would not be divulged to anyone else." *O'Laskey*, 224 Cal. App. 3d at 248.

DeTeresa asked the Ninth Circuit to reject the *O'Laskey* test for determining "confidentiality" and to apply a very different test: whether the plaintiff believed that someone could *overhear* the conversation in question. *See* Petition, pp. 25; 5a. The Ninth Circuit considered and rejected DeTeresa's arguments in this regard, which were based on a pre-*O'Laskey* case called *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (1988). As the Ninth Circuit explained:

> Under the terms of [section 632 of the Penal Code], if someone does not reasonably expect the conversation to be confined to the parties, it makes no difference under the statute whether the person reasonably expects that another is listening in or not. The communication is not confidential. In California, statutes are construed to give effect to all of their parts and to avoid rendering some words

> surplusage. . . . Because *Frio* stands at odds with the plain language of the statute, we predict that the California Supreme Court would reject it in favor of *O'Laskey*.

Petition, p. 8a (citation omitted).

DeTeresa concedes that the Ninth Circuit's choice of the *O'Laskey* approach to Penal Code § 632 was a "reasonable" one. Petition, p. 5 n.8. Given that this Court will defer to lower courts on state law issues unless their conclusions were "clearly erroneous or unreasonable," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 80 S. Ct. 1282, 1285 (1960), DeTeresa's concession should lead the Court to deny the petition.

2. *Invasion Of Privacy.*

DeTeresa's common law claim for invasion of privacy was based upon both the audiotaping of her conversation with Radziwill and upon the videotape footage taken of her from a public street. As the Ninth Circuit noted, under California law "there is a preliminary determination of offensiveness which must be made *by the court* in discerning the existence of a cause of action for intrusion." Petition, p. 10a (citation omitted) (emphasis added). After a discussion of several recent California cases, the Ninth Circuit affirmed the district court's entry of summary judgment on DeTeresa's common law privacy claim, holding that:

> [w]ith no dispute that ABC videotaped DeTeresa in public view from a public place, broadcast only a five-second clip of the tape, and did not broadcast either her name or her address, no intrusion into seclusion privacy claim lies as a matter of law.

Id., p. 11a.

DeTeresa attacks this conclusion primarily by ignoring the context in which it was made: on motion for summary judgment, rather than at the initial pleading stage. *See id.*, p. 21 (referring to "the prima facie actionability of the invasion. . . ."). At the summary judgment stage, the rhetoric of counsel is no substitute for probative evidence. Focusing on the *evidence* that was in the record, it is clear that the lower courts in this case properly concluded that the "undisputed material facts show an insubstantial impact on privacy interests under California law." *Id.*, p. 10a. This conclusion surely cannot be said to be "clearly erroneous or unreasonable", *Durham Lumber Co.*, 363 U.S. at 527, and it therefore should be afforded "great deference" by this Court. *Pembaur*, 475 U.S. at 484 n.13.

3. *Fraud.*

DeTeresa asserted that she was defrauded when Radziwill failed to disclose to her that their conversation was being recorded and/or that her picture was being taken. The Ninth Circuit held that under California law, there exists no fraud claim "for failure to disclose the intention to commit a wrongful act. . . ." Petition, p. 15a, *citing LiMandri v. Judkins*, 52 Cal. App. 4th 326, 338, 60 Cal. Rptr. 2d 539, 543 (1997). DeTeresa does not attempt to distinguish *LiMandri* or to suggest that the Ninth Circuit's reliance upon this very recently decided California Court of Appeal decision was unreasonable. There is therefore no justification for this Court to revisit the Ninth Circuit's rejection of DeTeresa's fraud claim.

C. The California Supreme Court's Decisions In Shulman And Sanders Are Unlikely To Provide Any Guidance On The State Law Issues In This Case.

The petition asks this Court to grant the writ of certiorari and "hold this case" until the California Supreme Court renders

its decisions in two cases pending before it, *Shulman v. Group W Productions*, 50 Cal. Rptr. 434, *review granted*, 62 Cal. Rptr. 2d 753 (Ct. App. 1997), and *Sanders v. American Broadcasting Companies, Inc.*, 60 Cal. Rptr. 2d 595, *review granted*, 64 Cal. Rptr. 2d 399 (Ct. App. 1997). *See* Petition, pp. 4-5, 10-12. DeTeresa suggests that these two decisions will likely provide guidance on the resolution of her Penal Code § 632 and common law privacy claims. *Id.*

DeTeresa made the same request in her suggestion for rehearing *en banc* filed with the Ninth Circuit. In response to that suggestion, no Ninth Circuit judge requested a vote on whether to rehear the matter en banc. This determination by the Ninth Circuit — that it need not withhold its mandate pending a decision by a state court — surely deserves substantial deference by this Court under the principles applied in *Pembaur* and *Cort*.

Moreover, the California Supreme Court's decisions in *Shulman* and *Sanders* are unlikely to provide any guidance on the issues addressed by the Ninth Circuit in this case. In *Shulman*, an automobile accident victim asserted claims for invasion of privacy against a television production company that had videotaped her rescue and subsequent medical treatment during a helicopter transport. 59 Cal. Rptr. 2d at 440. The trial court entered summary judgment on Mrs. Shulman's claims. The Court of Appeal partially upheld the entry of summary judgment "to the extent appellants' claims are based on respondents' conduct in videotaping and broadcasting what took place at the accident scene itself. . . ." *Id.* at 449. The Court held that "there can be no reasonable expectation of privacy at the scene of an accident in public view. . . ." *Id.* at 453.

The plaintiff in *Shulman* did *not* seek review by the California Supreme Court of the Court of Appeal's decision

partially affirming the entry of summary judgment. The principal question that the Supreme Court will address in *Shulman* is that raised by the media defendants in the case — whether an invasion of privacy claim arose from the taping that occurred while the accident victim in that case was "receiving emergency medical care *inside a closed air ambulance.*" *Shulman*, 59 Cal. Rptr. 2d at 440 (emphasis added). As a result, and contrary to DeTeresa's representations in her petition, the issue of whether a privacy claim can be asserted by a person photographed from a *public* vantage point is *not* presently before the California Supreme Court in *Shulman*.

Moreover, claims based upon California Penal Code § 632 are not presently at issue in either *Shulman* or *Sanders*, so the California Supreme Court's decisions in those cases will not resolve the conflict in the California cases that was identified in Judge Whaley's partial dissent below and addressed at length in the petition. The Court of Appeal in *Shulman* upheld the trial court's refusal to allow the plaintiff to amend her complaint to add a Penal Code § 632 claim. *See Shulman*, 59 Cal. Rptr. 2d at 444-5. The plaintiff in *Shulman* did *not* seek Supreme Court review on that issue. In *Sanders*, the jury found that the plaintiff did not have an objectively reasonable expectation that his taped conversation with an ABC investigator was confidential, and judgment was therefore entered against plaintiff on his Penal Code claim. *See Sanders*, 60 Cal. Rptr. 2d at 596-7. Because the plaintiff had not objected to the jury instruction in question, he could not challenge either the jury's finding on that issue or the judgment that had been entered against him on that claim. *Id.* at 596 n.1. It is thus unlikely that the Penal Code section at issue here will be addressed in either *Shulman* or *Sanders*.

D. The Ninth Circuit Properly Affirmed The Entry Of Summary Judgment On DeTeresa's Federal Eavesdropping Claim.

DeTeresa asserted a claim against ABC and Radziwill for violation of 18 U.S.C. § 2511, which prohibits the interception and recording of oral communications in certain circumstances. Section 2511(2)(d) expressly provides, however, that

> it shall *not* be unlawful . . . for a person . . . to intercept a wire or oral communication *where such person is a party to the communication* . . . .

(Emphasis added). The Ninth Circuit properly found that 18 U.S.C. § 2511 was inapplicable because Radziwill, who caused the conversation to be taped, was a party to the conversation. Petition, p. 13a.

DeTeresa contends that the taping by Radziwill violated federal law *even though* Radziwill was a party to the conversation, because 18 U.S.C. § 2511(2)(d) provides that a party may not record his own conversation with another person if he does so "for the purpose of committing [a] criminal or tortious act . . . ." *Id.* The Ninth Circuit correctly concluded that this statutory exception did not apply here, as the legislative history of section 2511 demonstrates.

Prior to 1986, 18 U.S.C. § 2511 barred a party from taping his own conversation if he were doing so "for the purpose of committing any criminal or tortious act . . . *or for the purpose of committing any other injurious act*." (Emphasis added). In 1986, Congress amended section 2511 by deleting the "other injurious act" language underlined above. As explained in the Senate Report, Congress deleted that language because it was concerned that its application in suits involving journalists posed a substantial threat to the guarantees of the First Amendment:

> In numerous court cases the term "other injurious purposes" has been misconstrued. Most troubling of these cases have been attempts by parties to chill the exercise of First Amendment rights through the use of civil remedies under this chapter. For example, in *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984), the plaintiff, whose conversations were recorded by a journalist, sued. Despite the consent of the reporter who was a party to the conversation, the plaintiff claimed that the recording of the conversation was illegal because it was done for an improper purpose, to embarrass her. While the appeals court decision in *Boddie* merely sent the case back for further factual development, it is clear from the facts of the case that the term "improper purpose" is overly broad and vague. The court's opinion suggests that if the network intended to cause "insult and injury" to plaintiff Boddie, she might be entitled to recover. This interpretation of the statute places a stumbling block in the path of even the most scrupulous journalist. *Many news stories have been brought to light by recording a conversation with the consent of only one of the parties involved — often the journalist himself. The present wording of Section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under Section 2511, even if the interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort. Such a threat is inconsistent with the guarantees of the First Amendment.*

S. Rep. No. 99-541, 99th Cong. 2d Sess. at 17 (1986), U.S. Code Cong. & Admin. News 1986, p. 3571 (emphasis added).

As this language demonstrates, Congress intended that the federal eavesdropping statute, as amended, would permit journalists to tape conversations in the course of newsgathering activities without obtaining the consent of the other parties to the conversation, as long as they did not make the tape for the express purpose of committing a crime or tort. *See Desnick v. American Broadcasting Cos., Inc.*, 44 F.3d 1345, 1353-4 (7th Cir. 1995) (holding that even though a news program that included surreptitiously taped footage might have been defamatory, federal eavesdropping claims were properly dismissed at the pleading stage because there was no suggestion that the *purpose* of the taping was to defame plaintiff).

While DeTeresa clearly disagrees with the policy determinations made by Congress when amending § 2511, her arguments in that regard are properly directed to Congress, not to this Court. It was the task of the District Court and the Ninth Circuit to apply the statute as amended. Under § 2511 as amended, DeTeresa bore the burden at the summary judgment stage of coming forward with probative evidence from which a reasonable jury could find that Radziwill's purpose in making the tape was to commit a crime or tort.

DeTeresa did not meet her burden. In fact, DeTeresa offered no evidence at all to refute defendants' showing that the associate producer's purpose in making the tape was to have DeTeresa's "actual words available to the reporters and senior producers working on the story" in light of "the rumors circulating and being reported" on the subjects addressed in his conversation with DeTeresa. Even if DeTeresa were correct, moreover, in arguing that her privacy was invaded by the taping, that did nothing to satisfy her burden of showing that committing that tort was Radziwill's *purpose* in making the tape. *See Desnick*, 44 F.3d at 1353. Summary judgment was therefore mandated with respect to DeTeresa's federal eavesdropping claim.

CONCLUSION

For all of the foregoing reasons, DeTeresa's petition should be denied.

Respectfully submitted,

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APPENDIX A — REQUEST FOR HEARING EN BANC BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56748

BEVERLY DETERESA,

Plaintiff and Appellant,

v.

AMERICAN BROADCASTING COMPANIES, INC., ANTHONY RADZIWILL,

Defendants and Appellees.

REQUEST FOR HEARING EN BANC

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE LINDA H. MCLAUGHLIN

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Appendix A

TO THE HONORABLE JUDGES OF THE NINTH CIRCUIT:

Beverly Deteresa requests a hearing en banc on the issues stated below.

I. ISSUES PRESENTED

I. THE COURT OF APPEALS DECISION MISAPPLIES AND MISAPPREHENDS THE CALIFORNIA COMMON LAW OF INTRUSION, AND THE DECISION IS IN DIRECT CONFLICT WITH THE LEADING CASE IN THE HISTORY OF HIDDEN CAMERAS, *DIETEMANN V. TIME,* A NINTH CIRCUIT DECISION. FURTHER, THE COURT OF APPEALS DID NOT TAKE INTO ACCOUNT THAT THE ELEMENTS OF INTRUSION ARE DIFFERENT FROM A LESSER THAN THOSE IN THE PENAL CODE RELATING TO UNLAWFUL EAVESDROPPING.

II. THE MAJORITY AND MINORITY AGREE THAT CALIFORNIA LAW IS CONFUSED AS TO THE PROPER TEST FOR THE PENAL CODE. THE CALIFORNIA SUPREME COURT IS CURRENTLY REVIEWING THE ISSUE. THIS COURT SHOULD REVIEW AND REVISIT THE AREA AFTER THE CALIFORNIA SUPREME COURT HAS DETERMINED WHICH TEST SHOULD BE APPLIED.

III. THE COURT OF APPEALS SHOULD HAVE ALLOWED THE FRAUD CLAIM TO PROCEED.

IV. THE COURT OF APPEALS MISAPPLIED THE FEDERAL EAVESDROPPING STATUTE: IT ALLOWS ONE PARTY TAPING, BUT THAT DID NOT OCCUR HERE, AND FURTHER, THE TAPING WAS TO COMMIT A CRIME OR A TORT.